Jan 13 2000

(14)

No. 99-474

Supreme Court, U.S.
FILED
JAN 13 2000
OFFICE OF THE CLERK

In The

Supreme Court of the United States

ANDREW S. NATSIOS, SECRETARY OF ADMINISTRATION AND FINANCE OF THE COMMONWEALTH OF MASSACHUSETTS, AND PHILMORE ANDERSON, III, STATE PURCHASING AGENT,

Petitioners,

v.

NATIONAL FOREIGN TRADE COUNCIL,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF OF *AMICI CURIAE* STATES OF ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, HAWAII, LOUISIANA, MAINE, MARYLAND, MINNESOTA, MISSOURI, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NORTH DAKOTA, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, TEXAS, UTAH, VERMONT, AND WASHINGTON IN SUPPORT OF PETITIONER

HEIDI HEITKAMP
Attorney General of North Dakota

DOUGLAS A. BAHR
Solicitor General

BETH ANGUS BAUMSTARK
Assistant Attorney General
Counsel of Record

600 East Boulevard Avenue
Bismarck, North Dakota
58505-0040
(701) 328-2210
Counsel for Amici States

[State Attorneys General Listed On Inside Cover]

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

33pp

MARK PRYOR
Attorney General
of Arkansas
200 Tower Building
323 Center Street
Little Rock AR 72201-2610

BILL LOCKYER
Attorney General of
California
1300 I Street
Sacramento CA 95814

KEN SALAZAR
Attorney General of
Colorado
1525 Sherman St. 7th Fl
Denver CO 80203

RICHARD BLUMENTHAL
Attorney General of
Connecticut
55 Elm Street
Hartford CT 06106-1774

EARL I. ANZAI
Attorney General of
Hawaii
425 Queen Street
Honolulu HI 96813

RICHARD P. IEYOUB
Attorney General of
Louisiana
Dept Of Justice
PO Box 94005
Baton Rouge LA 70804-9095

ANDREW KETTERER
Attorney General of
Maine
6 State House Station
Augusta ME 04333-0006

J. JOSEPH CURRAN, JR.
Attorney General of
Maryland
200 St. Paul Place
Baltimore MD 21202

MIKE HATCH
Attorney General of
Minnesota
445 Minnesota Street
St. Paul MN 55101-2128

JEREMIAH W. (JAY) NIXON
Attorney General of
Missouri
207 West High Street
Jefferson City MO 65101

PHILIP T. MCLAUGHLIN
Attorney General of
New Hampshire
33 Capitol Street
Concord NH 03301

JOHN J. FARMER, JR.
Attorney General of
New Jersey
Richard J. Hughes Justice
Complex
PO Box 117
Trenton NJ 08625-0117

PATRICIA A. MADRID
Attorney General of
New Mexico
PO Drawer 1508
Santa Fe NM 87504-1508

HEIDI HEITKAMP
Attorney General of
North Dakota
600 E Boulevard Ave
Bismarck ND 58505-0040

W. A. DREW EDMONDSON
Attorney General of
Oklahoma
2300 N Lincoln Boulevard
Oklahoma City OK
73105-4894

HARDY MYERS
Attorney General of
Oregon
1162 Court Street NE
Salem OR 97310-0506

D. MICHAEL FISHER
Attorney General of
Pennsylvania
16th Fl, Strawberry Square
Harrisburg PA 17120

SHELDON WHITEHOUSE
Attorney General of
Rhode Island
150 South Main Street
Providence RI 02903

JOHN CORNYN
Attorney General of
Texas
PO Box 12548
Austin TX 78711-2548

JAN GRAHAM
Attorney General of
Utah
236 State Capitol
Salt Lake City UT 84114

WILLIAM H. SORRELL
Attorney General of
Vermont
109 State Street
Montpelier VT 05609-1001

CHRISTINE O. GREGOIRE
Attorney General of
Washington
PO Box 40100
Olympia WA 98504-0100

TABLE OF CONTENTS

Page

Table of Contents i

Table of Authorities ii

Interest of *Amici* 1

Summary of Argument 3

Argument 6

I. THIS COURT SHOULD ADOPT A BRIGHT LINE TEST IN DETERMINING WHEN TO APPLY THE MARKET PARTICIPANT EXCEPTION TO THE COMMERCE CLAUSE 6

II. THE MARKET PARTICIPANT EXCEPTION TO THE DORMANT COMMERCE CLAUSE APPLIES EQUALLY TO INTERSTATE COMMERCE AND FOREIGN COMMERCE 16

III. THE MARKET PARTICIPANT EXCEPTION TO THE DORMANT COMMERCE CLAUSE IS APPLICABLE EQUALLY TO THE FEDERAL GOVERNMENT'S FOREIGN AFFAIRS POWER 19

Conclusion 23

TABLE OF AUTHORITIES

Page

CASES

American Yearbook Co. v. Askew, 339 F. Supp. 719 (M.D. Fla.), *summarily aff'd*, 409 U.S. 904 (1972) 18

Atkin v. Kansas, 191 U.S. 207 (1903) 7, 8, 9, 13

Board of County Comm'rs, Wabaunsee County, Kansas v. Umbehr, 518 U.S. 68 (1996)..... 16

Ellis v. United States, 206 U.S. 246 (1907) 7, 8

Heim v. McCall, 239 U.S. 175 (1915) 8, 9, 11, 12

Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976) 6, 17

Knight v. Barnes, 75 N.W. 904 (N.D. 1898) 7, 11

National Foreign Trade Council v. Natsios, 181 F.3d 38 (1st Cir. 1999) 12

New Energy Co. of Indiana v. Limbach, 486 U.S. 269 (1988) 18

Perkins v. Lukens Steel Co., 310 U.S. 113 (1940)..... 10

Reeves, Inc. v. Stake, 447 U.S. 429 (1980) .. 10, 11, 12, 18

South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82 (1984) 12, 13

State ex rel. Collins v. Senatobia Blank Book & Stationery Co., 76 So. 258 (Miss. 1917).....9, 11

United Bldg. & Constr. Trades Council v. Mayor of Camden, 465 U.S. 208 (1984)..... 18

TABLE OF AUTHORITIES – Continued

Page

United States v. Colgate & Co., 250 U.S. 300 (1919) 11, 15, 16

White v. Massachusetts Council of Const. Employers, Inc., 460 U.S. 204 (1983) 12

Wisconsin Dep't of Indus., Labor and Human Relations v. Gould, Inc., 475 U.S. 282 (1986)..... 12

Zschernig v. Miller, 389 U.S. 429 (1968) 19

FEDERAL AND STATE CONSTITUTIONS

U.S. Const. art. I, § 8.....7, 16

Tex. Const. art. XVI, § 70(r) (repealed by election held Nov. 2, 1999)..... 3

STATUTES

19 U.S.C. § 3511(a)(2) (1994) 21

19 U.S.C. § 3512(c) (1994)..... 21

Ark. Code Ann. § 24-3-416 (repealed 1994)..... 2

Cal. Gov't Code § 16641.5 (repealed 1994)..... 2

Conn. Gen. Stat. Ann. § 3-13f (repealed 1993) 2

Conn. Gen. Stat. Ann. § 3-13h (West 1999) 2

Fla. Stat. Ann. § 121.153 (West 1999)..... 2

Fla. Stat. Ann. § 215.471 (West 1999)..... 2

40 Ill. Comp. Stat. Ann. 5/1-110(4)(b)(4) (repealed 1994)..... 2

Iowa Code Ann. ch. 12A (repealed 1994)..... 2

TABLE OF AUTHORITIES – Continued

Page

Iowa Code Ann. § 18.3 (West Supp. 1999) 3

La. Rev. Stat. Ann. § 49:308.2 (repealed 1994) 2

Me. Rev. Stat. Ann. tit. 5, § 1951 (repealed 1993) 2

Me. Rev. Stat. Ann. tit. 5, § 1952 (repealed 1993) 2

Me. Rev. Stat. Ann. tit. 5, § 1953 (repealed 1993) 2

Me. Rev. Stat. Ann. tit. 5, § 1954 (repealed 1993) 2

Md. Code Ann., State Fin. & Proc. § 6-208 (repealed 1994) 2

Md. Code Ann., State Fin. & Proc. § 14-501 (repealed 1994) 1

Md. Code Ann., State Fin. & Proc. § 14-502 (repealed 1994) 1

Md. Code Ann., State Fin. & Proc. § 14-503 (repealed 1994) 1

Md. Code Ann., State Fin. & Proc. § 14-504 (repealed 1994) 1

Md. Code Ann., State Fin. & Proc. § 14-505 (repealed 1994) 1

Md. Code Ann., State Fin. & Proc. § 14-506 (repealed 1994) 1

Md. Code Ann., State Fin. & Proc. § 14-507 (repealed 1994) 1

Md. Code Ann., State Fin. & Proc. § 17-301 (1995) 3

Md. Code Ann., State Fin. & Proc. § 17-302 (1995) 3

Md. Code Ann., State Fin. & Proc. § 17-303 (1995) 3

Md. Code Ann., State Fin. & Proc. § 17-304 (1995) 3

TABLE OF AUTHORITIES – Continued

Page

Md. Code Ann., State Fin. & Proc. § 17-305 (1995) 3

Md. Code Ann., State Fin. & Proc. § 17-306 (1995) 3

Mass. Gen. Laws Ann. ch. 7, § 22C (West 1996) 1

Mass. Gen. Laws Ann. ch. 7, § 22D (West 1996) 1

Mass. Gen. Laws Ann. ch. 32, § 23 (West Supp. 1999) 2

Mich. Comp. Laws Ann. § 37.2402(f) (repealed 1993) 2

Mich. Comp. Laws Ann. § 38.1133a (West 1997) 2

Minn. Stat. Ann. § 11A.241 (West 1997) 2

Mo. Ann. Stat. § 105.686 (repealed 1994) 2

Neb. Rev. Stat. § 72-1246.06 (1996) 2

Neb. Rev. Stat. § 72-1246.07 (1996) 2

Neb. Rev. Stat. § 72-1246.08 (1996) 2

N.H. Rev. Stat. Ann. § 6:32 (Supp. 1999) 2

N.H. Rev. Stat. Ann. § 6:33 (Supp. 1999) 2

N.H. Rev. Stat. Ann. § 6:34 (Supp. 1999) 2

N.J. Stat. Ann. § 52:18A-89.1 (repealed 1994) 2

N.J. Stat. Ann. § 52:18A-89.2 (repealed 1994) 2

N.J. Stat. Ann. § 52:18A-89.3 (repealed 1994) 2

N.J. Stat. Ann. § 52:18A-89.4 (West Supp. 1999) 2

N.J. Stat. Ann. § 52:18A-89.5 (West Supp. 1999) 2

N.J. Stat. Ann. § 52:18A-89.6 (West Supp. 1999) 2

TABLE OF AUTHORITIES – Continued

Page

N.J. Stat. Ann. § 52:34-12.2 (West Supp. 1999) 1

N.M. Stat. Ann. § 13-1-188 (Michie 1997) 3

N.Y. Retire. & Soc. Sec. Law § 423-a (McKinney 1999) 2

N.Y. State Fin. Law § 165(5) (McKinney 1997) 1

N.C. Gen. Stat. § 147-69.2(c) (repealed 1995) 2

Ohio Rev. Code Ann. § 125.09 (Banks-Baldwin Supp. 1999) 3

Ohio Rev. Code Ann. § 125.11 (Banks-Baldwin Supp. 1999) 3

Ohio Rev. Code Ann. § 306.43(G) (Banks-Baldwin Supp. 1999) 3

Ohio Rev. Code Ann. § 5513.07 (Banks-Baldwin Supp. 1999) 3

Okla. Stat. tit. 61, § 51 (West 1997) 3

Okla. Stat. tit. 62, § 71(E) (repealed 1994) 2

Okla. Stat. tit. 62, § 89.2(E) (repealed 1994) 2

Oregon Anti-Apartheid Act of 1987, Or. Rev. Stat. §§ 293.830 to 293.870 (1997) 2

24 Pa. Cons. Stat. Ann. § 8527 (West 1992) 2

71 Pa. Cons. Stat. Ann. § 5940 (West Supp. 1999) 2

72 Pa. Cons. Stat. Ann. § 3773.1 (West 1995) 2

R.I. Gen. Laws § 35-10-12 (1997) 2

R.I. Gen. Laws § 35-10-14 (1997) 2

R.I. Gen. Laws § 37-2-57 (repealed 1999) 1

TABLE OF AUTHORITIES – Continued

Page

Tenn. Code Ann. § 54-5-135 (1998) 3

Tex. Gov't Code Ann. § 404.024(h) (West 2000) 2

Tex. Nat. Res. Code Ann. § 161.173(b), (c)(2), (c)(5) (repealed 1995) 2

1989 Vt. Acts & Resolves 50 2

OTHER AUTHORITIES

H.R. Doc. No. 103-316 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3773 ..... 21, 22

Barton B. Clark, Comment, *Give 'Em Enough Rope: States, Subdivisions and the Market Participant Exception to the Dormant Commerce Clause*, 60 U. Chi. L. Rev. 615 (1993) 15

INTEREST OF *AMICI*

The 22 *Amici* States submit this brief in support of Massachusetts. The States have a strong interest in state sovereignty and in protecting the right of States to pass laws governing state procurement and investment of state funds. Through these laws, elected State Legislatures legitimately exercise the citizens' sovereign right to decide how to spend and invest public money. Further, the *Amici* States have an interest in the Supreme Court's establishing a clear test that will limit the challenges to actions the States take in their proprietary roles.

New Jersey, New York, and Massachusetts have statutes that restrict the State's purchasing goods from specific countries or from companies that do business in those countries.[1] Currently, at least fourteen States have statutes that govern the State's investment of state funds in certain other countries or in businesses that do business with those countries.[2] The countries in which

---

[1] New Jersey and New York restrict state purchasing from Northern Ireland. N.J. Stat. Ann. § 52:34-12.2 (West Supp. 1999); N.Y. State Fin. Law § 165(5) (McKinney 1997). Massachusetts, in addition to its Burma Law, also restricts state purchasing from companies that have links with Northern Ireland. Mass. Gen. Laws Ann. ch. 7, §§ 22C, 22D (West 1996). Maryland and Rhode Island have repealed statutes limiting state purchases of goods produced in South Africa. *See* Md. Code Ann., State Fin. & Proc. §§ 14-501 to 507 (repealed 1994); R.I. Gen. Laws § 37-2-57 (repealed 1999).

[2] States having restrictions on investment of state funds in companies doing business with Northern Ireland include: Connecticut, Florida, Massachusetts, Michigan, Minnesota, Nebraska, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Texas, and Vermont. *See* Conn.

investments are limited or restricted include Cuba, Northern Ireland, and South Africa. Since the end of apartheid, many States have repealed their laws restricting investments in South Africa.[3] In addition to these

---

Gen. Stat. Ann. § 3-13h (West 1999); Fla. Stat. Ann. § 121.153 (West 1999); Mass. Gen. Laws Ann. ch. 32, § 23 (West Supp. 1999); Mich. Comp. Laws Ann. § 38.1133a (West 1997); Minn. Stat. Ann. § 11A.241 (West 1997); Neb. Rev. Stat. §§ 72-1246.06 to .08 (1996); N.H. Rev. Stat. Ann. §§ 6:32 to :34 (Supp. 1999); N.J. Stat. Ann. §§ 52:18A-89.4 to 89.6 (West Supp. 1999); N.Y. Retire. & Soc. Sec. Law § 423-a (McKinney 1999); 24 Pa. Cons. Stat. Ann. § 8527 (West 1992), 71 Pa. Cons. Stat. Ann. § 5940 (West Supp. 1999), and 72 Pa. Cons. Stat. Ann. § 3773.1 (West 1995); R.I. Gen. Laws § 35-10-14 (1997); Tex. Gov't Code Ann. § 404.024(h) (West 2000); 1989 Vt. Acts & Resolves 50. Florida restricts investments of state funds in companies doing business with Cuba. Fla. Stat. Ann. § 215.471 (West 1999). The following States restrict the investment of state funds in South Africa: Massachusetts, Oregon, and Rhode Island. *See* Mass. Gen. Laws Ann. ch. 32, § 23 (West Supp. 1999); Oregon Anti-Apartheid Act of 1987, Or. Rev. Stat. §§ 293.830 to 293.870 (1997); R.I. Gen. Laws § 35-10-12 (1997).

[3] Arkansas, California, Connecticut, Illinois, Iowa, Louisiana, Maine, Maryland, Michigan, Missouri, New Jersey, North Carolina, Oklahoma, and Texas all have repealed statutes restricting investment of state funds in South Africa. *See* Ark. Code Ann. § 24-3-416 (repealed 1994); Cal. Gov't Code § 16641.5 (repealed 1994); Conn. Gen. Stat. Ann. § 3-13f (repealed 1993); 40 Ill. Comp. Stat. Ann. 5/1-110(4)(b)(4) (repealed 1994); Iowa Code Ann. ch. 12A (repealed 1994); La. Rev. Stat. Ann. § 49:308.2 (repealed 1994); Me. Rev. Stat. Ann. tit. 5, §§ 1951-1954 (repealed 1993); Md. Code Ann., State Fin. & Proc. § 6-208 (repealed 1994); Mich. Comp. Laws Ann. § 37.2402(f) (repealed 1993); Mo. Ann. Stat. § 105.686 (repealed 1994); N.J. Stat. Ann. §§ 52:18A-89.1 to 89.3 (repealed 1994); N.C. Gen. Stat. § 147-69.2(c) (repealed 1995); Okla. Stat. tit. 62 §§ 71(E), 89.2(E) (repealed 1994); Tex. Nat. Res. Code Ann. § 161.173(b), (c)(2), (c)(5) (repealed 1995); and Tex. Const. art. XVI, § 70(r) (repealed by election held Nov. 2, 1999).

types of statutes, many States have "Buy American" laws.[4]

Although the instant case involves a state selective purchasing law, the market participant exception to the dormant Commerce Clause – both interstate and foreign – would apply equally to state laws limiting investment of state funds. Any expansion by this Court of the federal government's dormant foreign affairs power to strike down state laws governing state proprietary actions would threaten state decisions regarding investments as well as decisions regarding procurement.

SUMMARY OF ARGUMENT

The *Amici* States urge this Court to adopt a bright line test in determining when to apply the market participant exception to the Commerce Clause. States are engaged in the marketplace as participants when they make procurement and investment decisions. Consequently, the market participant exception to the Commerce Clause applies. The Commerce Clause analysis,

---

[4] For example, Iowa, Maryland, New Mexico, Ohio, Oklahoma, and Tennessee have some variety of a "Buy American" law. *See* Iowa Code Ann. § 18.3 (West Supp. 1999); Md. Code Ann., State Fin. & Proc. §§ 17-301 to 306 (1995); N.M. Stat. Ann. § 13-1-188 (Michie 1997); Ohio Rev. Code Ann. §§ 125.09, 125.11, 306.43(G), 5513.07 (Banks-Baldwin Supp. 1999); Okla. Stat. tit. 61, § 51 (West 1997); Tenn. Code Ann. § 54-5-135 (1998).

therefore, is complete. A bright line test provides clear direction to both the States and the courts in evaluating controls the States place on their own procurement and investment decisions.

The roots of the market participant exception to the Commerce Clause support the bright line test. The negative implication of the Commerce Clause, both its interstate and foreign aspects, is directed at limiting the States' authority to regulate commerce, not participate in it. The right of States as guardians and trustees for their people and the public fisc requires that the States have freedom in deciding what restrictions to place on the spending and investing of their money. Applying the market participant exception to the Commerce Clause any time the State is purchasing goods or services or investing its money preserves the right of States when acting in their proprietary role to be free from restrictions that do not affect private parties.

Federal statutes that regulate private entities in making procurement or investment decisions also may regulate a State's decisions in these areas. If so, the statutes apply directly to the States. It is not necessary to try to judge each State decision by whether a private party could or would make the same decision or consider the same factors in reaching a decision.

If this Court does not adopt the bright line test urged by the *Amici* States, an alternate test is proposed. Currently courts frequently look to whether a private business would be likely to act in the way the State is acting in making proprietary decisions. Instead the question should be rephrased: Could a private party legally act as

the State is acting? Stated in this way, the test more accurately reflects the underpinnings of the market participant exception to the Commerce Clause.

The philosophical bases for the market participant exception to the Commerce Clause apply with equal force to both the interstate and foreign aspects of the Commerce Clause. A State's decisions governing its procurement of goods and services or investment of its money constitute participation in the marketplace and not regulation. This does not change because it is foreign markets rather than interstate markets that may be affected. A State's interest in determining its own trading partners is not lessened because foreign commerce may be involved. A State's role as guardian and trustee for its people and of the public fisc is no less when decisions affect foreign commerce. The States' right to be free from restrictions which do not apply to private parties in making proprietary decisions is just as strong regardless of whether interstate or foreign commerce is involved. This case offers the Court the opportunity to clearly hold that the market participant exception applies to both the foreign and interstate aspects of the Commerce Clause.

The market participant exception also should prevent a State's proprietary actions in procuring goods or services or in investing its money from being invalidated under the federal government's foreign affairs power. Decisions that a State makes in these areas are not decisions that could prevent the federal government from exercising its foreign affairs power. The decisions may have an indirect effect on businesses of other countries, but they do not have a direct effect on the federal government's foreign affairs policy.

Further, Congress and the Executive Branch have exercised their foreign affairs power to provide a mechanism for addressing complaints that state laws violate international trade agreements. A process has been established within the trade agreements themselves to handle such complaints. Congress in the Uruguay Round Agreements Act specifically determined that private court action on any basis was inappropriate for complaints under or connected with the trade agreements. The Executive Branch in its Statement of Administrative Action, approved in the Uruguay Round Agreements Act, stated that such lawsuits themselves could interfere with the President's exercise of his foreign affairs power.

ARGUMENT

I. THIS COURT SHOULD ADOPT A BRIGHT LINE TEST IN DETERMINING WHEN TO APPLY THE MARKET PARTICIPANT EXCEPTION TO THE COMMERCE CLAUSE.

The history and public policy foundations of the market participant exception to the Commerce Clause support the application of a bright line test: applying the market participant exception any time a State is acting in its proprietary role making decisions regarding its procurement of goods or services or investment of its money.

The market participant exception to the dormant Commerce Clause, first expressed by this Court in *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976), has a long history. In 1898, the North Dakota Supreme Court addressed whether a state statute requiring that all

county printing be done within the State violated Article 1, Section 8 of the United States Constitution. *Knight v. Barnes*, 75 N.W. 904 (N.D. 1898). The court held that the statute did not violate the interstate Commerce Clause. It stated: "[A]s a question of principle, we are unable to see why the state is forbidden to do what an individual certainly may do with impunity, viz. elect from whom it will purchase supplies needed in the discharge of its corporate functions." *Id.* at 906.

Then, in *Atkin v. Kansas*, 191 U.S. 207 (1903), this Court held that the State, acting as guardian and trustee for its people in the control of the State's affairs, had the power to place conditions upon public work to be done on its behalf, or on behalf of its municipalities. *Id.* at 222-23. Writing for the Court's majority, Justice Harlan stated that the courts have no authority to review the conditions a State places on contracts for public works. "Regulations on this subject suggest only considerations of public policy. And with such considerations the courts have no concern." *Id.* at 223. The Court further determined that the motives behind enactment of the statute were irrelevant and did not affect the State's authority. *Id.* at 222. *Cf. Ellis v. United States*, 206 U.S. 246 (1907) (speculation over Congress' motive in passing an act regulating the conditions under which the government would contract cannot be used to limit Congress' authority over government contracts). Summing up the majority decision in *Atkin*, the Court stated:

> We rest our decision upon the broad ground that the work being of a public character, absolutely under the control of the state and its municipal agents acting by its authority, it is for the state

> to prescribe the conditions under which it will permit work of that kind to be done.

191 U.S. at 224.

The principle proclaimed by this Court in *Atkin* – that a State, acting as guardian and trustee for its people, has the power to place conditions on contracts it enters – applies in the case of selective purchasing laws and any time a State acts in its proprietary role. Such application is in accord with the idea that a State, when acting as a contractor, has the same rights as any private contractor. Justice Holmes, writing for the majority in *Ellis*, 206 U.S. at 256, stated that the "government, purely as contractor, in the absence of special laws, may stand like a private person."

This Court's decision in *Heim v. McCall*, 239 U.S. 175 (1915), lends additional support to application of a bright line test. In *Heim*, this Court held that the State of New York had the authority to determine that only United States citizens may be employed in the construction of public works by the State, a municipality, or any person contracting with the State or municipality, and further that preference for such employment must be given to New York citizens. The Court relied upon the principle set forth in *Atkin* that "it belongs to the state, as the guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf, or on behalf of its municipalities." *Id.* at 192-93. The Court also upheld the limitation on the construction of a treaty with Italy regarding the rights of Italian citizens within the United States. The Court of Appeals had concluded that the

treaty "does not limit the power of the state, as a proprietor, to control the construction of its own works and the distribution of its own moneys." *Id.* at 193. This Court determined that such a conclusion was inevitable based on the principles it had announced. *Id.*

Although *Atkin* and *Heim* addressed state action via public works, the Court in each case based its opinion on the State acting in its proprietary role and as a participant in the marketplace. Therefore, whether the State is entering a service contract, purchasing goods, or investing its money, the same principles apply. In each situation, the State acts in its proprietary role and as guardian and trustee of the public fisc.

In 1917 the Mississippi Supreme Court analyzed a state law restricting county officials from purchasing records and books from companies not engaged in the printing business in the State. *State ex rel. Collins v. Senatobia Blank Book & Stationery Co.*, 76 So. 258 (Miss. 1917). In its Commerce Clause analysis, the court determined the statute did not attempt to regulate any contracts other than the State's own contracts. *Id.* at 260. After pointing out that a private entity has the right to enter a contract with whomever it chooses, the court determined that there is no specific provision of the Constitution requiring the State to enter into a contract with any person or corporation without the State's consent. Consequently, it held that the State cannot be forced to do so. *Id.* Further, the court noted that the statute expressly provided how both resident and nonresident citizens and corporations could qualify to sell to the State, become amenable to process in the State, and do the work within the State. *Id.*

The right of the government to act as any other business when it enters the marketplace was again addressed in *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940). In *Perkins* this Court stated: "Like private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases." *Id.* at 127.

Although *Perkins* involved an act by the federal government, the principles involved apply equally to state governments when acting as market participants. The Court stated that the purpose of the federal act in *Perkins* was "to obviate the possibility that any part of our tremendous national expenditures would go to forces tending to depress wages and purchasing power and offending fair social standards of employment." *Id.* at 128. The Court emphasized that the act did not purport to regulate private businesses but only instructed the government agents with authority to fix the terms and conditions under which the government would purchase goods. *Id.* at 128-29.

This Court in *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980), identified several policy considerations underlying the market participant exception. The most important consideration was the absence of any "constitutional plan to limit the ability of the States themselves to operate freely in the free market." *Id.* at 437. Quoting from constitutional scholar Lawrence Tribe, this Court noted that "the commerce clause was directed, as an historical matter, only at regulatory and taxing actions taken by states in their sovereign capacity." *Id.* This Court also identified

the following considerations as supporting the market participant exception to the Commerce Clause:

- Considerations of state sovereignty when the State is acting as guardian and trustee for the State's residents (citing *Heim*, 239 U.S. at 191);
- Considerations of fairness that dictate because state proprietary actions are burdened with the same restrictions as actions by private market participants, state proprietary actions also should receive the same freedom from federal constraints (citing *Senatobia*, 76 So. at 260, and *Tribune Printing & Binding Co. v. Barnes*, 75 N.W. 904, 906 (N.D. 1898) (cited supra as *Knight v. Barnes*));
- The right of a private business to choose its trading partners (citing *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919));
- The practical difficulty in evaluating state proprietary activities under the traditional Commerce Clause analysis (as shown by the case before the Court in *Reeves*).

Reeves, 447 U.S. at 438-39. Each of these underpinnings of the market participant exception would be followed by the application of a bright line test.

Bright Line Test

The market participant exception to the dormant Commerce Clause protects the activities of a State acting in a proprietary manner. Because it is uncertain how a court will determine whether a State is acting purely in its proprietary role, it is important that this Court adopt a

bright line test. An appropriate test would apply the market participant exception to the dormant interstate and foreign Commerce Clause any time the State is involved in purchasing goods or services or investing its money. In these instances, the State acts in its proprietary role and as guardian and trustee of the State's assets, thus satisfying the *Heim* rationale. The effect on interstate or foreign commerce is indirect and does not amount to regulation of the private sector. Therefore, the purposes behind the Commerce Clause do not come into play.

This Court has already stated that when the market participant exception is involved, there is only one question: Is the State involved in the market as a participant? *Reeves*, 447 U.S. at 435 n.7. If it is, the action is exempt from Commerce Clause restrictions, and the degree of the effect of the State's proprietary decisions on interstate or foreign commerce is irrelevant. *Reeves*, 447 U.S. at 435-36. *See also White v. Massachusetts Council of Const. Employers, Inc.*, 460 U.S. 204, 208 (1983) (reaffirming principle of single inquiry in market participant cases). This indeed sounds like a bright line test. The cases, however, show that the courts sometimes remain focused on questions of the motives of the State in enacting its laws, the degree of the effect of the laws on interstate or foreign commerce, or whether the State's actions go beyond participation in the marketplace to regulation. *See National Foreign Trade Council v. Natsios*, 181 F.3d 38, 63-65 (1st Cir. 1999); *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 96-99 (1984); *Wisconsin Dep't of Indus., Labor and Human Relations v. Gould, Inc.*, 475 U.S. 282, 289 (1986) (Discussion of

the market participant exception is largely dicta, however, because the Court found Wisconsin's law was preempted by the National Labor Relations Act).

Under the true bright line test recommended by the *Amici* States, the State's motives in enacting its statutes governing state procurement or investments are irrelevant. This is consistent with the principle followed in *Atkin*. Likewise, whether a private party would or could take the actions taken by the State in its procurement or investment decisions would not be the deciding factor in determining whether the market participant exception to the Commerce Clause applies. Although this would appear to vary from the rationale that States should be burdened only to the same extent as private parties, the end result, as discussed below, would be the same. In short, if the State is governing only its own procurement or investment decisions and practices, the market participant exception would apply.

The application of the Commerce Clause market participant exception to the States' actions completes the Commerce Clause analysis. It does not, however, eliminate other possible challenges to a State's action in proprietary matters. Other federal laws like the anti-trust laws, which apply to the States only when they are acting as market participants, would still apply. *See Wunnicke*, 467 U.S. at 101-02 (Rehnquist, J., dissenting). In most cases, if a private business were prohibited from taking certain actions by federal law, the same law could prohibit the State from taking those same actions. To the extent that Congress has exempted the States from restrictions that a federal statute places on private businesses, such Congressional determination should be

upheld. The courts, under those circumstances, should not rely upon a private party's inability to act in a certain manner as the basis for rejecting a State's proprietary action under the Commerce Clause. If federal statutes apply to the States, then those laws should be applied *directly* to the States. If the statutes do not apply to the States' actions by their terms, then the Commerce Clause should not be used to apply the statutes.

The Massachusetts Burma Law limits the State's procurement of goods and services from companies that do business with Burma. It does not regulate purchasing by private parties within the State. It does not prohibit private parties within the State from doing business with Burma. The statute governs only the State's spending of public funds to purchase goods and services. Therefore, under the bright line test recommended by the *Amici* States, the market participant exception to the Commerce Clause applies to Massachusetts' Burma Law. No further analysis is necessary under the Commerce Clause.

Alternate Test

If the Court chooses not to adopt the bright line test proposed by the *Amici* States, an alternative test exists. The alternate test still would provide an appropriate analysis for use by lower courts in applying the market participant exception to the Commerce Clause. Under the market participant exception, the courts have sometimes questioned whether the State is acting in the same way that a private party would act in contracting. One commentator has suggested that the more appropriate question would be whether a private party *could* act as the

State has acted. *See* Barton B. Clark, Comment, *Give 'Em Enough Rope: States, Subdivisions and the Market Participant Exception to the Dormant Commerce Clause*, 60 U. Chi. L. Rev. 615, 627 (1993).

Although this test is not the bright line advocated by the *Amici* States, it still retains the advantage of placing the States in the same position as private parties when it comes to contract matters. Additionally, the courts would not need to decide if or how often a private party would make the same contracting decisions – an area that has caused much debate. Any decision that a private party legally could make or any factor that a private party legally could take into consideration in making procurement or investment decisions also should be available to a State in making its procurements or investments. For instance, just as a company's motivation or purpose in making procurement or investment decisions or the effect of those decisions on foreign or interstate commerce would not be reviewable by a court, so too should such proprietary actions taken by a State be free from court review.

In *Colgate*, 250 U.S. 300, this Court evaluated, under the Sherman Act, the conduct of a manufacturer in limiting the persons to whom it would sell to those who resell only according to the manufacturer's guidelines. This Court recognized:

> [I]n the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal; and,

> of course, he may announce in advance the circumstances under which he will refuse to sell.

Id. at 307.

Using the test set forth in *Colgate*, Massachusetts' announcement in advance of the circumstances under which it will purchase goods or services from a business – that the entity does not engage in business with Burma – is an action a private company lawfully could take. Consequently, under the alternate test, Massachusetts is not prohibited by the Commerce Clause from taking such action because its action is covered by the market participant exception.

As Justice Scalia, joined by Justice Thomas, pointed out in his dissent in *Board of County Commissioners, Wabaunsee County, Kansas v. Umbehr*, 518 U.S. 668 (1996), state decisions about with whom to contract frequently will take into account the moral and political views of the government and the type of organizations it wishes to subsidize through its purchases. The *Amici* States strongly believe that the moral integrity of a potential trading partner is a legitimate concern to be considered by a State when acting as guardian of the public fisc.

II. THE MARKET PARTICIPANT EXCEPTION TO THE DORMANT COMMERCE CLAUSE APPLIES EQUALLY TO INTERSTATE COMMERCE AND FOREIGN COMMERCE.

The Commerce Clause grants Congress the power "[t]o regulate commerce with foreign nations, and among the several states." U.S. Const. art. 1, § 8. Consequently, the negative implication of this language relates only to

the *regulation* by States of commerce with foreign nations and among the several States. Nothing in the Commerce Clause, either expressly or by implication, denies the States the authority to conduct their own affairs, even if the conduct of those affairs has an effect on interstate or foreign commerce.

In *Hughes*, 426 U.S. at 805, 810, this Court stated:

> [W]e are not persuaded that Maryland's action in amending its statute was the kind of action with which the Commerce Clause is concerned. . . . Nothing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others.

Maryland amended its statute regarding the documentation needed by out-of-state processors to participate in a bounty program whereby the State paid for the abandoned vehicles delivered to scrap processors. Maryland did not interfere with the functioning of the interstate market by burdensome regulation or by prohibiting private activities. Rather, Maryland conditioned the State's purchase of automobile hulks on the receipt of certain documentation. This Court stated:

> Until today the Court has not been asked to hold that the entry by the State itself into the market as a purchaser, in effect, of a potential article of interstate commerce creates a burden upon that commerce if the State restricts its trade to its own citizens or businesses within the State.

426 U.S. 808.

In today's world of vast global markets, there are very few actions a State could take that would not somehow have an effect on foreign commerce. Only direct interference with foreign commerce, accomplished by state regulation of private industry, however, is prohibited by the dormant foreign Commerce Clause. As pointed out by the court in *American Yearbook Co. v. Askew*, 339 F. Supp. 719 (M.D. Fla.), *summarily aff'd*, 409 U.S. 904 (1972), no company has a vested right to sell to the State. "Trade regulations are clearly subject to Commerce Clause restrictions, but statutes that merely specify the conditions of state purchases are not." 339 F. Supp. at 725.

Likewise, this Court explained in *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 277 (1988), that it is only the actions which a State takes in its distinctive governmental capacity that are subject to the limitations of the negative Commerce Clause, not the actions a State takes in its more general role as a market participant. As Justice Rehnquist, writing for this Court in *United Building & Construction Trades Council v. Mayor of Camden*, 465 U.S. 208, 220 (1984), stated: "When the State acts solely as a market participant, no conflict between state *regulation* and federal regulatory authority can arise." (Emphasis in original.)

This Court's dicta in *Reeves* is the only indication that the market participant exception to the Commerce Clause might not apply to actions of States, in their proprietary role, that affect foreign commerce. In *Reeves* the Court stated it had no need to explore the application of the foreign Commerce Clause to state proprietary actions. 447 U.S. at 437 n.9. There is no constitutional or philosophical

reason why the market participant exception to the Commerce Clause should not apply equally regardless of whether it is interstate or foreign commerce that is affected.

This Court has never used the negative implication of the foreign Commerce Clause to strike down a state statute that controlled only procurement or investment decisions of a State or its political subdivisions. A State's proprietary decisions and its actions as a participant in the marketplace always have been respected as decisions that were the State's alone to make. Whether they affect interstate or foreign commerce, the procurement and investment decisions of a State are proprietary – not regulatory – actions. The *Amici* States call upon this Court to pronounce what always has been the unstated understanding of the States: When the States are acting as market participants, neither the foreign nor the interstate aspect of the Commerce Clause applies.

III. THE MARKET PARTICIPANT EXCEPTION TO THE DORMANT COMMERCE CLAUSE IS APPLICABLE EQUALLY TO THE FEDERAL GOVERNMENT'S FOREIGN AFFAIRS POWER.

The Federal Government's Foreign Affairs Power

The dormant foreign affairs power of the federal government as set forth by this Court in *Zschernig v. Miller*, 389 U.S. 429, 432 (1968), stems from the foreign affairs powers the United States Constitution entrusts to Congress and the President. *Zschernig* is the only case in which this Court has used the federal government's "foreign affairs power" to strike down a state law. That case

involved a state statute that regulated who could inherit property within the State.

Applying the market participant exception to the federal government's "foreign affairs power", thus, does not mark a change in this Court's practice. Rather, until the instant case, the proper mix of facts and lower court holdings had not appeared before this Court to require a determination on the applicability of the market participant exception to the foreign affairs power of the federal government. Here, however, the Respondent is asking this Court to hold a State's procurement decisions are an interference with the federal government's foreign affairs power simply because they may have an effect on foreign commerce. This proposition is meritless.

As pointed out in Argument II above, in today's world of vast global markets, there are very few procurement decisions a State could make that would not somehow have an effect on foreign commerce. A decision preventing the States from determining their own trading partners because some companies or other governments do not like the decisions made would rewrite the entire history of state sovereignty and the principles of federalism.

The fact that the Massachusetts law in question applies equally to foreign and domestic companies that do business with Burma demonstrates that this is indeed a statute governing the State's own purchasing and is not a regulation of foreign commerce. Further, even if it were, it would not interfere with the federal government's power to regulate foreign affairs. Congress arguably could enact a law prohibiting any State, political subdivision, or private business from restricting purchases from,

or investments in, other countries or from companies that do business with specific countries. No state law can prohibit Congress or the Executive Branch from exercising its foreign affairs power.

Congress' And The Executive Branch's Exercise Of Their Foreign Affairs Power

Congress and the Executive Branch have exercised their foreign affairs power to establish a manner for addressing complaints that a State's actions violate international commitments. The international trade agreements entered into by the United States establish procedures for handling alleged violations by States and local governments. The Uruguay Round Agreements are an example. The Executive Branch and Congress have acted pursuant to their constitutional authority to establish a comprehensive system under the World Trade Organization for addressing complaints by member nations that the laws of the United States or her political subdivisions violate the Uruguay Round Agreements. The Implementation Bill and the Statement of Administrative Action, in fact, specifically prohibit a private cause of action, either directly or indirectly, attacking a State's law under, or in connection with, the Uruguay Round Agreements on any basis, including under Congress' Commerce Clause authority. 19 U.S.C. § 3512(c) (1994); H.R. Doc. No. 103-316, at 676 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3773, 4055.

The Statement of Administrative Action for the Uruguay Round Agreements Act, adopted by Congress in 19 U.S.C. § 3511(a)(2) (1994), further emphasizes:

> With respect to the states, section 102(c) represents a determination by the Congress and the Administration that private lawsuits are not an appropriate means for ensuring state compliance with the Uruguay Round Agreements. Suits of this nature may interfere with the President's conduct of trade and foreign relations and with suitable resolution of disagreements or disputes under those agreements.

H.R. Doc. No. 103-316, at 676 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3773, 4055.

Actions by States that may violate the international trade agreements the United States has entered do not interfere with the federal government's foreign affairs power. Rather, the federal government, through the Executive Branch and Congress, has considered the possibility that state laws may do so and has established a system to address any such problems. In addition, Congress and the Executive Branch have stated that involvement by the judiciary, by itself, could interfere with the exercise of their constitutional foreign affairs powers.

CONCLUSION

For the foregoing reasons, the 22 *Amici* States respectfully request the Court to reverse the judgment of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

HEIDI HEITKAMP
Attorney General
State of North Dakota

DOUGLAS A. BAHR
Solicitor General

BETH ANGUS BAUMSTARK
Assistant Attorney General
Counsel of Record
600 East Boulevard Avenue
Bismarck, North Dakota
58505-0040
(701) 328-2210